

# Role of the company secretary

Traditionally company secretaries have had the role of administering the affairs of the company and managing the business of the board. The corporate collapses of the late 1990s and early 2000s have impacted on this role through the increased focus of shareholders on governance and transparency. As a result, the board's role in governing and monitoring the organisation has been emphasised.

As the responsibilities of the board has increased, the volume of work and necessary skills to support this work has enhanced the role of the company secretary. They are now considered to be the chief governance specialist within an organisation with boards increasingly reliant on them for advice and implementation of good governance practices in the organisation. It is a more proactive role than in previous times.

Company secretaries have legal responsibilities plus fulfil other expectations for the board. These other duties will vary according to the needs of the organisation.

## What are the legal requirements for company secretaries?

[Section 204](#) in Part 2D.4 of the *Corporations Act 2001* outlines rules regarding the appointment of company secretaries. These rules are that:

- In public companies at least one company secretary must be appointed and at least one secretary must be resident in Australia. (s204A(2)) Proprietary companies are no longer required to have a company secretary (s204A(1)), but if they choose to, the rule for public companies applies.
- Only those over 18 years of age (s204B(1)) who have not been disqualified from managing companies under Part 2D.6 may be appointed secretary unless approved by ASIC (s206F) or by leave of the Court (s206G)
- The person must give their consent to act as secretary (s204C(1)) and this consent must be kept by the company (s204C(2))
- Directors appoint the company secretary (s204D)
- Directors determine terms and conditions including remuneration. ASIC must be notified of the appointment within 28 days (s205B(1)) (ASIC Form 484).
- If they are disqualified from managing companies during their term, they cease to be the company secretary unless permission is granted by ASIC
- An act done by a secretary is effective even if their appointment, or the continuance of their appointment, is invalid because the company or secretary did not comply with the company's constitution or the Corporations Act. (s204E). An act by a secretary that binds the company in its dealings with other persons or makes the company liable to another person cannot be validated retrospectively (s204E(2)).

When a company secretary resigns / retires, the company must lodge ASIC Form 484 within 28 days of change (accompanied by letter of resignation (s205A(2))).

There is no prohibition in the Corporations Act on a person acting both as director and secretary of a company.

[Section 188](#) lists the functions of company secretaries that can be contravened:

- To maintain a registered office (s142)
- If a public company, to keep the registered office open to the public during certain hours

(s145)

- Lodge notices regarding personal details of directors and secretaries with ASIC (s205B)
- To respond to ASIC questions (ss346C / 346D)
- To notify ASIC of a change to the principal place of business (s 146) and any issue of shares (s254X)
- To lodge financials with ASIC (s319(1)).
- To notify ASIC of change to member register (proprietary company only) (s178A)
- To notify ASIC of change to share structure (proprietary company only) (s178C)
- To notify ASIC of changes to ultimate holding company (proprietary company only) (s349A)

A defence can be argued if the secretary took all reasonable steps to ensure that the company complied (s188(3)).

If a proprietary company does not have a secretary, each director is responsible for these acts and contravenes the Corporations Act if the company does not comply with these provisions.

The value of company secretaries is recognised in the Australian Securities Exchange (ASX) Corporate Governance Council's [Corporate governance principles and recommendations](#). They recommend that all directors should have access to the company secretary and that the secretary be accountable to the board.

## What are typical duties of a company secretary?

The role of the company secretary has elements of both compliance and performance. While their legal duties have not changed enormously in the last decade, the additional responsibilities have<sup>1</sup>.

In addition to the functions listed in s 188 above, compliance duties would typically include:

- Managing board processes – board and committee papers and circulation of agendas, minutes, discussion papers, proposals for the board and its committees;
- Ensuring members' and directors' meetings are properly called and held. Note a company secretary cannot call a meeting without authority (ie a delegation / instruction from the board etc)
- Ensuring records of members' and directors' meetings are kept in compliance with the Corporations Act and the organisation's constitution; (again company secretary cannot do this without authority)
- Ensuring legal requirements with ASIC and other regulators are met, including continuous disclosure;
- Providing advice to directors regarding the Corporations Act, constitution, ASX requirements and other legal and regulatory needs;

Newer roles relating to board performance including:

- Advising the board on good practice in corporate governance, e.g. giving guidance on the legal implications of the way it discharges its duties, runs meetings, makes decisions, etc.
- Promoting the compliance framework to safeguard the integrity of the organisation
- Counselling the board on standards of ethical and corporate behaviour
- Ensuring the board has the information it needs to make informed decisions (for the Business Judgment Rule defence)
- Organising board performance reviews
- Involvement in risk management and corporate responsibility matters
- Policy formulation for the board
- Managing director induction and maintenance of a director manual
- Organising Directors' & Officers' (D&O) insurance

<sup>1</sup> Bush, F "Duties and responsibilities of the 21<sup>st</sup> century company secretary", *Keeping Good Companies*, Vol.58(9), October 2006, p536

A survey of company secretaries<sup>2</sup> showed that in 2006 they were also responsible for:

- Management of the board (100% of company secretaries surveyed)
- ASX announcements and continuous disclosure (100%)
- Corporate governance matters (96.7%)
- The organisation and running of annual general meetings (95.1%)
- Management of board committees (95.1%)
- Ensuring the annual report is compiled and distributed to shareholders (68.9%)

## To whom does a company secretary report?

Historically the company secretary has reported to the chief financial officer<sup>3</sup> or chief executive. Given that the board technically appoints the company secretary and that the role is heavily focused on board performance, then it is also appropriate that they also report to the chairman of the board.

The ASX Principles recommend that the company secretary be accountable to the board through the chairman on all governance matters<sup>4</sup>.

## What qualifications should a company secretary have?

There is no legal requirement that a company secretary has any qualification however for listed companies the experience and qualifications must be disclosed in the annual report (s 300(10) Corporations Act).

Because of the volume of legal compliance work and necessary knowledge of the Corporations Act and other legislation, it is common for company secretaries to have legal qualifications. Their role is often also combined with that of general counsel in many organisations, although this is apparently decreasing<sup>5</sup>.

If boards prefer their company secretary to have a formal qualification signalling their commitment to high governance standards, Chartered Secretaries Australia (CSA) offer a Graduate Diploma in Applied Corporate Governance. CSA is the professional body for company secretaries and membership is denoted by the post-nominals ACIS for a member and FCIS for a Fellow.

## How does the board evaluate the company secretary's performance?

Like that of other professionals, it is advisable that the board regularly evaluate the performance of the company secretary. The appraisal should be based on their written job description and list of responsibilities.

To supplement this, a pro-forma from Chartered Secretaries Australia might assist<sup>6</sup>.

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<sup>2</sup> *Benchmarking governance in practice in Australia*, Sydney: Chartered Secretaries, 2006, p4.

<sup>3</sup> Bush, *ibid*, p536

<sup>4</sup> [Corporate governance principles and recommendations](#), 2<sup>nd</sup> ed., Sydney: ASX Corporate Governance Council, 2007. Recommendation 2.5 (page 20)

<sup>5</sup> *Benchmarking governance in practice*, *ibid*, p4. 41% in 2005 held a combined company secretary/general counsel role, down from 49% in 2001.

<sup>6</sup> "Pro forma performance evaluation for a company secretary/CFO", *Keeping Good Companies*, Vol. 58(9), October 2006, pp526-531.

## Are company secretaries officers under the Corporations Act?

Company secretaries fall under the definition of a company officer (s 9 of the *Corporations Act 2001*), so they have the same duties and obligations as directors. These duties involve acting with care and diligence in good faith and for a proper purpose without using their position or information received in the line of duty to gain personal advantage or to cause harm to the organisation<sup>7</sup>.

## Should the company secretary be covered under the board's D&O policies and deeds of access and indemnity?

Because company secretaries are subject to the same liabilities as directors, it would make sense that they be covered under the organisation's D&O policies and deeds of access and indemnity. Any thing that purports to indemnify or insure a company secretary against a liability, or exempt a company secretary from liability that contravenes s199A or 199B is void.

*Benchmarking governance in practice in Australia* (2006) showed that only 57% of deeds cover company secretaries. Therefore there is a large percentage of company secretaries with no cover.

### Sources

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- [Corporations Act 2001](#), accessed on AustLII, 15 June 2007
- [Good governance guide no 8.4 - Roles, duties and responsibilities of company secretary](#), Sydney: Company Secretaries Australia, December 2006
- "Pro forma performance evaluation for a company secretary/CFO", *Keeping Good Companies*, Vol. 58(9), October 2006

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<sup>7</sup> See [General duties and responsibilities of directors and officers](#).

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